

1712. *June 18.* JACOB MOOR, and his Factor, *against* SIR ALEXANDER MAXWELL of Monreith.

IN the pursuit, at the instance of Jacob Moor, as creditor to the deceased William Houstoun of Cutreoch, against Sir Alexander Maxwell, for payment of William Houstoun's debt, upon the passive titles,—the Lords found the defender not liable as vitious intromitter; albeit he had intromitted with the defunct's goods and gear: in respect he had, after intromission, before citation at the pursuer's instance, confirmed the subject intromitted with, which purged the former vitiosity: notwithstanding that the Act 20, Parl. 1696, statutes, that the intromitters with the moveables of any defunct, who are not executors confirmed to them, nor have right from the executor-creditor before intromission, shall be liable as vitious intromitters, though there is a third party confirmed executor in a particular debt or subject: because, in the present case, the defender himself is confirmed executor-creditor to the defunct, before citation in the pursuer's process, though after the intromission; and so falls not within the verge of that statute.

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1712. *June 19.* SIR JOHN MALCOLM of Innertiell, and MICHAEL MALCOLM of Balbedie, *against* HER MAJESTY'S ADVOCATE and SOLICITORS.

JOHN MAITLAND of Eccles having, in anno 1661, obtained from King Charles the Second, a gift under the Privy Seal, of the feu-duties and other emoluments of the ministry of Scotlandwell, and some other chaplainries and altarages, during all the days of his lifetime, and after his decease, to Maitland, his son:—This gift was conveyed by progress, from John Maitland to Sir John and Michael Malcolms, who pursued the feuars of Scotlandwell for bygone feu-duties.

Compearance was made for the Queen's interest, by her Majesty's Advocate and Solicitors, who ALLEGED,—1. That the gift was prescribed, never having been clothed with possession by John Maitland, the obtainer, or his assignee, in the cedent's lifetime: And any possession since his death, cannot come *in computo* to hinder prescription;—seeing the gift died with the cedent, the blank therein not being filled up by him who only had power to do it. 2. *Et separatim*, this gift being expedite through the registers, and at the Privy Seal, in favours of John Maitland of Eccles, and after his decease, to Maitland, his son, the name of no particular son of Eccles's could be thereafter filled up therein. 3. *Esto*, the recording of the gift blank, did not take away Eccles's son's right, this son is presumed in law to be the eldest son and heir living at the date of the gift. Now, the said eldest son having died before the father made the assignment, and the father having never filled up another son's name, the blank right, which neither the presumption of law, nor Eccles's election doth supply, is determined and expired. 4. Suppose the blank could imply a power in favours.